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No. 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 30

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

PETITION FOR REHEARING

Joe Hayes, an American Indian of the Umatilla Tribe in Oregon respectfully petitions this Honorable Court to rehear the petition for certiorari in this case.

Exhibit "A" appearing at the end of this petition contains substantial evidence not previously presented relating to the grounds which served as the bases for the Agency's determination in this case.[1]

Petitioner contends that there has been a lack of due process due to the failure of the Court of Appeals to rule on the substantive issue in this case which was caused by the Government's misstatement of the substantive grounds which were the bases for the Agency's determination.

This case turns on the single question of whether the devisee, under his father's will, Joseph Thomas, survived his father John Thomas.

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[1] Exhibit "A" consists of Sheets 1 and 4 of the "Summary of Report on Heirs" of the Examiner of Inheritance, dated July 29, 1941.

The Government stated in the District Court that there was "no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father", and that the Agency's determination was grounded on a presumption under Oregon Law. There being no issue of fact, both petitioner and the Government moved for summary judgment on the substantive question of whether Oregon law had been properly applied by the Agency in the case. The District Court decided for the Government and petitioner appealed to the Court of Appeals.

In the Court of Appeals the Government completely shifted its position. Its previous position notwithstanding, the Government represented to the Court that the Agency determination that Joseph Thomas survived his father John could be supported *solely* on a finding of fact supported by the evidence. The Government further stated that it had not relied on Oregon law; that Oregon law was inapplicable; that "federal" law governed in the case and that "to do otherwise would be clearly in error."[1]

Thus the substantive grounds represented by the Government to the District Court and those represented to the Court of Appeals as being the bases for the Agency's determination were diametrically opposed and fundamentally irreconcilable. This variance was belatedly acknowledged by the Government in its brief to this Court in opposition to the petition for certiorari, when it stated that the "Secretary . . . did intend to base his decision on Oregon law and on a legal presumption rather than upon an inference of fact."[2]

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[1] In contrast "Sheet 1", line 4 of Exhibit "A" indicates beyond question that the heir of John Thomas was determined "in accordance with the laws of the State of Oregon". "Sheet 4" of Exhibit "A" indicates that there was no evidence or finding of fact to show that Joseph Thomas did or did not survive his father John Thomas.

[2] See footnote on Page 6 of Respondent's brief in opposition to the petition for certiorari.

The Government still leaves unexplained its failure to advise the Court of Appeals that it had intended to apply Oregon law and a legal presumption rather than an inference of fact. The Government fails to explain why it permitted the Court to rule on grounds which admittedly were specious.

In the landmark case of *Security and Exchange Commission* v. *Chenery Corp. et al.*, this Court stated:

> ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed."
> "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." [1]

The review of the Court of Appeals was predicated on legal and factual grounds which the Government now belatedly admits were specious. By failing to disclose the real grounds for its determination, and substituting other and specious grounds the Government diverted the attention of the Court of Appeals from ruling on the question of whether the Government properly applied the law of the State of Oregon in this case. We are faced with the unpleasant fact that because of the Government's conduct of this case there has been no ruling at the appellate level on the only substantive issue of the case.

Elementary standards of justice and fair dealing require that this Indian, a ward of the Government, be afforded an appellate ruling on the substantive issue of the case.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that his petition for certiorari be granted, or in the alternative, that the case be remanded to the Court of Appeals for a ruling on the unresolved question of

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[1] 318 U.S. 80, 94 (1942).

whether the Agency correctly applied the law of the State of Oregon in its determination.

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I certify that the foregoing petition is presented in good faith and not for delay and that it is restricted to the grounds above specified.

LEON BENEZRA

EXHIBIT A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Field Service

(Received Office of Indian Affairs Jul 29 1941 46742)

Salem Oregon
July 21, 1941

SUMMARY OF REPORT ON HEIRS

Estate of John Thomas, deceased Umatilla Allottee No. C-223, died Sept. 22, 1940, aged 52, hearing held Nov. 18, 1940 at Umatilla Indian Agency, Pendleton, Oregon.

Heirs, at the date of hearing, in accordance with the laws of the State of Oregon.

Heir	Relationship	Share
Joseph Thomas,	son,	All.

The trust or restricted estate of the decedent consists of:

Original allotment, appraised at (Fee Patent)	$———
Inherited lands, appraised at	18,200.00
Cash, securities, or other personal restricted estate appraised at	389.03
Total:	$18,539.03

No dower, curtesy, or homestead rights involved.

/s/ Wilburt Bokker
WILBURT BOKKER
Special Examiner of Inheritance.
Reviewed and approved:

/s/ Joseph Coursey
JOSEPH COURSEY
Examiner of Inheritance.

Verified Aug 14 1941

By /s/ A. A. Mulyner
Chief, Probate Division.

* * * *

From correspondence in the file of Joseph Thomas, decedent's son, Umatilla Allottee 877, it appears that in the Fall of 1939 he was employed in a CCC camp on Warm Springs Reservation, Oregon, that he went to Portland, Oregon, for a few days visit apparently intending to return to his work but did not, and no trace has been found of him although Umatilla Agency has made diligent search for him. He still has some wages due him for his CCC work and some cash has come into his account at Umatilla Agency since his disappearance on a lease; his folder shows that heretofore he was a wanderer but each year when lease money was due he was prompt in sending for it. The feeling at the Umatilla Agency is that he may be dead.

The said son is recommended to be found the heir in the case and should evidence be found at a later date that he died before his father it will be a simple matter to vacate the finding herein indicated as after the claims and probate fee are paid this estate wil be kept intact for whatever eventually should develop. If it be found that Joseph Thomas died before his father then Joe Hayes appears to be in line for inheritance; if Joseph Thomas survived the father it might be that his half-brother (maternal), Sam Luton, will be the heir. As Joseph Thomas has a reputation for travelling around it is entirely possible that he will show up at Umatilla Agency in due course.

The claim of George Moens, Pendleton, Oregon, in amount, $87.13, is recommended for payment in full. It appears he was co-signer with decedent on the three notes filed with the claim, all of which feel due after decedent's death and the claimant paid same with the interest charges thereon.

The claim of White House Market, $21.37, for merchandise sold decedent in period, April 1 to June 30,

1940, appears to be just and is recommended for allowance.

The claim of Miller's Service Station, Pendleton, Oregon, in amount, $4.73, for gasoline and oil furnished decedent in September, 1940, is recommended for allowance.

The claim of The Green Grocery, Inc., of Pendleton, Oregon, in amount, $289.27, for merchandise sold to decedent in period, June 1 1939 to September 10, 1940, is recommended for allowance.

Fred R. Young, of Pendleton, Oregon, filed a claim, $196.46, on a judgment had against decedent December 26, 1922 and renewed Feb. 19, 1932; it appears the judgment arose out of merchandise sold to decedent in March, 1922 in amount, $53.80. An Indian's trust property is judgment-proof hence the judgment is of no effect against this estate and does not serve to change the transaction from an open account on which the Statute of limitations expired in 1928. The claimant testified that decedent refused to pay this account. It is recommended that the claim be not allowed.

/s/ Wilburt Bokker
WILBURT BOKKER

Special Examiner of Inheritance.